SUPREME COURT, U. S.
Supreme Court, U.S.
FILED
APR 2
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 19

No. 73-1468

RENE TEXEIRA
FRANCIS TEXEIRA
JUSTINO TEXEIRA

Petitioners,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions and Rules Involved	2
Statement of the Case	3
The Record	3
The Facts	3
Reasons for Granting the Writ	4
Conclusion	8
Appendix "A" Order Denying Rehearing	A-1

TABLE OF AUTHORITIES

CASES CITED

	Page
Alford v. United States, 282 U.S. 687 (1931)	4
Brookhart v. Janis, 384 U.S. 1 (1966)	4,6
Davis v. Alaska, — U.S. — (No. 72-5794, decided 2/27½74)	6
Greene v. McElroy, 360 U.S. 474 (1959)	4
Ross v. United States, 180 F.2d 160 (6th Cir. 1950)	7
United States v. Bass, 425 F.2d 161 (7th Cir. 1970)	7
United States v. Clark, 468 F.2d 890 (5th Cir. 1972)	7
United States v. Masino, 275 F.2d 129 (2d Cir. 1960)	5
United States v. Mendoza, 473 F.2d (5th Cir. 1973)	7

STATUTES CITED

Constitution of the United States:	
Fifth Amendment	2
Sixth Amendment	2
Federal Rules of Criminal Procedure	
Rule 30	2

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THE UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Rene Texeira, Francis Texeira, and Justine Texeira pray that a writ of certiorari issue to review the orders of the United States Court of Appeals for the Second Citcuit entered in this case on January 10, 1974.

OPINION BELOW

No opinion has been rendered or filed by the Court of Appeals in this case. The order denying the petition for rehearing is reprinted as Appendix "A" hereto, *infra*.

JURISDICTION

The order of the Court of Appeals was entered on January 10, 1974. That in a petition dated January 21, 1974, petitioners

petitioned, pro se, for reargument. On March 8, 1974, the Court of Appeals for the Second Circuit denied said petition. The jurisdiction of this Court is invoked under Title 28, United States Code §1254 (1).

QUESTIONS PRESENTED

1. Whether the District Court's limitations on defense counsel's cross-examination with respect to the bias, hostility, and motive to lie of the prosecution witnesses denied petitioners due process and their right to confrontation.

2. Whether, as to petitioner Rene Texeira the District Court's failure to comply with Rule 30, Federal Rules of Criminal Procedure, requires that petitioner, Rene Texeira, be granted a new trial.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Constitution of the United States, Fifth Amendment:

> No person shall . . . be deprived of life, liberty, or property, without due process of law;

Constitution of the United States, Sixth Amendment:

> In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him;

Federal Rules of Criminal Procedure, Rule 30:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the

requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or mission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on the request of any party, out of the presence of the jury.

STATEMENT OF CASE

The Record

The record of the Court of Appeals consists of all filed documents as well as the minutes of trial and sentence.

The Facts

This was a joint appeal from a judgment of conviction in the United States District Court for the Southern District of New York, Hon. Kevin Duffy, District Judge. On July 6, 1973, after a jury trial, the defendants were found guilty of conspiring to violate Title 21, United States Code, Sections 173 and 174. On September 4, 1973, Rene Texeira, and Justino Texeira were sentenced to prison terms of twenty years; Francis Texeira was sentenced to a fifteen year term. On January 10, 1974, these convictions were affirmed without written opinion by the Court of Appeals for the Second Circuit.

The Government's case rested primarily on the testimony of three co-conspirators, Pamela Ramirez, Angelica Rovira and Vidalena Reyes.

The defense concentrated on attacking the honesty of the three main witnesses. Various inconsistencies in their testimony, and in their prior statements to investigating agents, were revealed. Finally, each of these witnesses conceded that she had

been promised immunity, in some cases extending to other family members as well.

During cross-examination of Ramirez, defense counsel twice sought to elicit the length of the prison sentences facing this witness, in order to demonstrate the practical effect of the promises made to secure her cooperation as a Government witness; the Court did not permit this inquiry.

Defense counsel also attempted to inquire about a conversation they had with Ramirez. An offer of proof was made that the defense would show that Ramirez had answered some questions and not others, and that her failure to answer these questions related to her motive to lie. The trial court foreclosed the line of inquiry because it felt it might lead to the jury's hearing about threats made against Ramirez. Defense counsel indicated to the court that any explanation of her failure to answer on the grounds that threats had been made against her was nonsense. Moreover, after having been so apprised, defense counsel wished to continue to inquire but was prevented by the court.

After all the evidence was in the defendants submitted joint requests to charge; the Court did not act on these requests until after the summation on behalf of Rene Texeira.

REASONS FOR GRANTING THE WRIT

The issues in this case are of substantial constitutional importance, relating to the efficacy and construction of the due process clause of the Fifth Amendment and of the confrontation clause of the Sixth Amendment.

1. In light of *Alford v. United States*, 282 U.S. 687 (1931); *Greene v. McElroy*, 360 U.S. 474 (1959) and *Davis v. Alaska*, — U.S. — (No. 72-5794 decided 2/27/74); 14 CrL 3117, the extent of cross-examination permitted by the Court is of constitutional dimension, affecting both due process and the right to confrontation.

As stated in *United States v. Masino*, 275 F.2d 129, 133 (2d Cir. 1960):

> Indeed, where the principal witnesses appearing in behalf of the prosecution *** have engaged in illegal practices and are accomplices to the crime charged, it is essential to a fair trial that the court allow the defendant to cross-examine such witnesses as widely as the rules of evidence permit.

Clearly, in two separate instances, the District Court restricted the scope of cross-examination in a critical area. Ramirez's testimony was the most significant in the trial. What term of imprisonment she faced on the Federal charges, if prosecuted, and what she faced on the state charges were crucial to show just how powerful a motive she had to lie. Her expectations of leniency for her testimony was a proper subject for inquiry. This was so as to the state case as well. It was necessary to show that Ramirez was facing a long prison term and just what she expected for her cooperation. The more severe the penalty she faced, the greater the motive to lie.

Of all the factors which go into showing a motive to lie, the length of incarceration facing the witness is the most significant. It is the first thing that comes to mind and the most powerful personal reason to fabricate. The stopping of the inquiry into the witness' understanding of what sentences she faced went beyond the exercise of discretion and invaded the defendant's right to confront the witnesses and to a fair trial.

This denial also effected the scope of the inquiry as to the other accomplice-witnesses. It is clear that defense counsel relied upon the ruling of the District Court and did not pursue this line of questioning as to them.

As this court has stated:

> 'Petitioner was thus denied the right of effective cross-examination which would be constitutional error of the

first magnitude and no amount of showing of want of prejudice would cure. *Brookhart v. Janis*, 384 U.S. 1, 3' *Davis v. Alaska*, U.S. (No. 72-5794, decided 2/27/74); 14 Crl. at 3120-21.

No case of this court has dealt specifically with this question: Whether there is a fundamental right to cross-examine a witness (admittedly guilty of a crime) as to his understanding of what prison term he will face if he fails to cooperate with the prosecution.

2. Defense counsel for Rene Texeira submitted timely requests to charge. The court's decision on requests was not given until after counsel's summation.[1]

Rule 30 of the Federal Rules of Criminal Procedure states:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, out of the presence of the jury.

The procedure set out is a mandatory rule requiring the trial judge before closing argument, to inform counsel what action he

1. The court announced its decision before the summations for the other two defendants and for the government.

will take relative to the requested jury instructions, so that counsel may intelligently argue the case to the jury. *Ross v. United States*, 180 F.2d 160, 165 (6th Cir. 1950); *United States v. Mendoza*, 473 F.2d at 700 (5th Cir. 1973).

In order for the requirements of Rule 30 to arise it is necessary for defense counsel to make timely requests for instructions. *United States v. Mendoza, supra* at 700. This was done.

Here, the trial judge did not inform counsel for Rene Texeira of his proposed action on those requests until after said counsel's summation.

It appears that some circuits require strict compliance with this mandate, *United States v. Bass*, 425 F.2d 151 (7th Cir. 1970), and others require only "substantial compliance." *United States v. Mendoza*, supra, at 701; *United States v. Clark*, 468 F.2d 890 (5th Cir. 1972).

Here, there was, as regards Rene Texeira, no compliance at all. Petitioner contends that the prejudice from such failure is inherent and that this error requires reversal. This is particularly so because the Government had the advantage of the procedure in Rule 30. Certainly, it can not be said with reasonable assurance that the outcome would have been the same if the defense had been properly informed prior to summation; see *United States v. Mendoza, supra* at 701.

No case of this court has dealt with the impact of a failure to comply with Rule 30, especially where the prosecution has had the benefit of compliance with Rule 30.

CONCLUSION

FOR ALL THE FOREGOING REASONS A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SHOULD BE GRANTED.

Respectfully submitted,

GOLDBERGER, FELDMAN &
BREITBART, ESQS.
Attorneys for Petitioner

Appendix A

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 8th day of March, one thousand nine hundred and seventy-four.

United States of America,

Appellee,

v.

Rene Texeira, et al.,

Appellants.

A motion having been made herein by Appellants for rehearing

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

WILLIAM HUGHES MULLIGAN
WILLIAM H. TIMBERS
Circuit Judges

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1468

RENE TEXEIRA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the trial court improperly restricted the cross-examination of a key government witness. Petitioner Rene Texeira also contends that the court's failure to rule on his proposed jury instructions before his closing argument was reversible error under Rule 30, Fed. R. Crim. P.

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to traffic in heroin, in violation of 21 U.S.C. (1964 ed.) 173, 174. Petitioners Rene Texeira and Justino Texeira were sentenced to twenty years' imprisonment, and petitioner Francis Texeira was sentenced to fifteen years'

imprisonment. The court of appeals affirmed without opinion.

Pamela Ramirez testified that in 1968, she began selling heroin for her uncles, petitioners Rene and Justino Texeira (Tr. 16-20). In 1969, Ramirez and others began helping petitioners "bag up" heroin. This operation involved first diluting heroin and then putting five dollars worth of the mixture in an individual bag (Tr. 20-23, 27, 37-38, 235-238, 398-399). Ramirez and others also acted as couriers for petitioners on several occasions, taking "bagged up" heroin from New York City to New Orleans, Louisiana (Tr. 24-26, 27-31, 33-34, 238-241).

1. Petitioners' contention that the trial court improperly restricted the cross-examination of Pamela Ramirez is without merit.

During the course of her cross-examination, petitioners sought to ask Pamela Ramirez whether she was aware that the petitioners were subject to five-year mandatory sentences if convicted. Petitioners argued that this evidence would show the motive Ramirez had for testifying for the government by establishing the penalties she would have faced if prosecuted with petitioners. The court sustained the government's objection, stating that the penalties petitioners faced were none of the jury's concern (Tr. 107, 108).

This ruling by the court was correct. Petitioners had already elicited from the witness the fact that she was cooperating with the government in return for an agreement not to prosecute her, her mother and her sister on charges growing out of the same offenses as those of the petitioners. She had also testified that she hoped to obtain a reduction of the sentence she and her husband were facing on other unrelated drug charges.

Ramirez had thus clearly indicated that her motive for testifying was in large part self-protective. Asking her if she was aware of the penalties petitioners faced if convicted was simply another way of covering the same ground; at the same time, it would improperly have informed the jury of the penalties that petitioners faced.

A similar situation occurred later in the trial, when Ramirez was being questioned about state charges involving possession of narcotics. She admitted that she was awaiting sentencing on those charges, thus indicating that she had a motive to cooperate with the prosecution in the instant case. The court sustained a government objection to a question asking what type of felony possession was. Ramirez had already fully discussed the pending state charges she faced, and any further discussion of the type of felony involved would merely have been cumulative (Tr. 162-163).

The limits of cross-examination to show bias and motivation lie within the sound discretion of the trial court. *United States* v. *Blackwood*, 456 F. 2d 526, 529 (C.A. 2); *United States* v. *Daddano*, 432 F. 2d 1119, 1128 (C.A. 7), certiorari denied, 402 U.S. 905; *Tinker* v. *United States*, 417 F. 2d 542, 544 (C.A. D.C.), certiorari denied, 396 U.S. 864; *United States* v. *Stacey*, 452 F. 2d 1204 (C.A. 5). There is no abuse where the "jury was otherwise in possession of sufficient information concerning formative events to make a 'discriminating appraisal' of a witness' motives and bias." *United States* v. *Campbell*, 426 F. 2d 547, 550 (C.A. 2). Such was the case here.

2. Petitioner Rene Texeira's contention that the trial court's failure to comply with Rule 30,[1] constitutes reversi-

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[1]Rule 30 was intended to prevent a defendant from arguing a theory of defense to the jury only to have the court then refuse to give an instruction in that area. It reads as follows:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may

ble error despite the lack of any evidence that petitioners were prejudiced, is incorrect.

Prior to his closing argument, counsel for petitioner Rene Texeira asked the trial court which of his requested instructions it intended to grant. The court responded that it was not possible to decide at that time, and counsel raised no objection (Tr. 579). When the court made its decision on the requested instructions, it granted in substance all of petitioner Rene Texeira's requests (Tr. 647). No objection was made to the decision.

Courts have consistently held that the defendant must show prejudice in order to require a reversal for failure to comply with Rule 30. The party must show that he was unduly or unfairly prevented from making his argument to the jury or was substantially misled by the court's action or inaction in formulating his argument. *Whitlock* v. *United States*, 429 F. 2d 942, 945-946 (C.A. 10); *Walker* v. *United States*, 418 F. 2d 1116, 1118-1119 (C.A. D.C.); *United States* v. *Kroncke*, 459 F. 2d 697, 705 (C.A. 8); *United States* v. *Mendoza*, 473 F. 2d 697, 700-701 (C.A.

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file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

5); *Wright v. United States*, 339 F. 2d 578, 579-580 (C.A. 9). Here, there was no evidence of any prejudice to petitioner by the court's failure to comply with Rule 30.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.